No. 01-20-00004-CR & No. 01-20-00005-CR

In the Court of Appeals for the
First District of Texas at Houston

Ex parte

JOSEPH ERIC GOMEZ,
Applicant

On Appeal from Trial Court Case No. 1657519 and 1657521
Before the 338th Judicial District Court of Harris County, Texas

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APPLICANT'S BRIEF

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ORAL ARGUMENT REQUESTED

IDENTIFICATION OF PARTIES AND COUNSEL

Pursuant to Texas Rule of Appellate Procedure 52.3(a), a complete list of the names of all interested parties is provided below:

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TO THE HONORABLE COURT OF APPEALS:

STATEMENT OF THE CASE

Officers with the Deer Park Police Department arrested and charged Applicant with the felony offenses of burglary of a habitation and assault of a family member – impeding breathing. The State of Texas filed complaints for both cases with the Harris County District Clerk under cause numbers 1653305 and 1653306, respectively, and the cases were assigned to the 338th Judicial District Court of Harris County, Texas.

Shortly after his arrest, a Harris County magistrate judge reviewed the cases and set bonds at $25,000.00 and $15,000.00 on each case, respectively. Applicant immediately posted surety bail bonds in those amounts and was released thereafter. Hours later that same morning, as directed on his bond paperwork, Applicant appeared before the Honorable Ramona Franklin, Presiding Judge of the 338th Judicial District Court of Harris County, Texas. Without any prior notice or the opportunity to have counsel of his own choosing present at this court appearance, the trial court *sua sponte* held a hearing to review the bonds set. After hearing an otherwise-inadmissible reading of the prob-

able cause for the arrest from the attorney for the State, without good and sufficient cause, the trial court revoked the bonds Applicant had just posted to secure his release, ordered Applicant be remanded back into the custody of the Sheriff of Harris County, and raised the bonds to $75,000.00 in each case.

Applicant filed an application for writ of habeas corpus with the Harris County District Clerk on November 21, 2019 seeking to vacate the trial court's order revoking the bonds in those cases; the applications were assigned their own cause numbers: 1657519 and 1657521 for each case, respectively. On December 10, 2019, the trial court held a hearing on the applications and, after receiving evidence and hearing argument from Applicant and the State, denied the applications. Applicant immediately gave his notice of appeal.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Texas Rules of Appellate Procedure 38.1(e), 39.1, and 39.7, Applicant requests oral argument in this case. This case involves an unsettled issue regarding a trial court's ability to revoke and raise a defendant's bond. As the evidence presented in this case established, this was not an isolated incident. The trial court is frequently revoking

and raising criminal defendants' bond without notice and without a proper hearing simply because it is not satisfied with the bond set by the magistrate and, other criminal district court judges in Harris County are following suit. Immediate guidance is needed from this Court and Applicant submits that the Court's decisional process would be aided by oral argument.

ISSUES PRESENTED

1. Whether the trial court illegally revoked Applicant's bonds and raised the bond amounts without justifiable cause.

2. Whether the manner in which the trial court held its *sua sponte* hearing violated due process and the Rules of Evidence.

STATEMENT OF FACTS

On November 13, 2019, officers with the Deer Park Police Department arrested Applicant and charged him by complaint with the felony offenses of burglary of a habitation and assault of a family member – impeding breathing.[1] The State of Texas filed the complaints with

[1] *See* Applicant's Exhibit 1 (Complaints for both cases), Reporter's Record (hereafter RR) Vol. 4 at 2–5 (admitted at RR Vol. 2 at 8); Supplemental Clerk's Record (hereafter Supp. CR) at 4. There are separate reporter's records and clerk's records for each cause number assigned in the district court and each case number in this Court but they are identical to one another. Accordingly, for sake of brevity, within this brief, citation is only being made to one reporter's record or one clerk's record.

the Harris County District Clerk which assigned the cases to the 338th Judicial District Court of Harris County, Texas.[2]

After officers booked Applicant into the Harris County Jail, on November 14, 2019 at approximately 4:47 a.m., Applicant appeared before a Harris County magistrate judge pursuant to Article 15.17, Texas Code of Criminal Procedure.[3] The proceeding was video recorded and the trial court admitted the recording at the hearing on Applicant's application for writ of habeas corpus.[4]

While Applicant consented to allowing an assistant public defender to represent him at this bail hearing, he explicitly did not request the appointment of counsel to represent him in the district court if determined to be indigent.[5] Furthermore, as informed by the magistrate, the assistant public defender would represent Applicant at the bail hearing before the magistrate *only*; the magistrate explicitly advised Applicant

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[2] *See* Applicant's Exhibit 1, RR Vol. 4 at 2–5; Supp. CR at 4.

[3] *See* Applicant's Exhibit 2 (Statutory Warning by Magistrate – Probable Cause for Further Detention – PR Bond/Bail Orders for both cases), RR Vol. 4 at 6–11 and Applicant's Exhibit 5 (Video of probable cause hearing) (both admitted RR Vol. 2 at 9).

[4] *See* Applicant's Exhibit 5.

[5] *See* Applicant's Exhibit 2 and Applicant's Exhibit 5.

that "this lawyer will not continue to represent you when this hearing is over."[6]

After finding that probable cause existed for further detention, the magistrate proceeded to consider bond for Applicant.[7] In doing so, the magistrate considered a Public Safety Assessment and requests by both the attorney for the State and the assistant public defender appointed to Applicant.[8] After hearing from both sides, in cause number 1653305 charging Applicant with burglary of a habitation, the magistrate set bond at $25,000.00.[9] In cause number 1653306 charging Applicant with assault of a family member – impeding breathing, the magistrate set bond at $10,000.00.[10]

Immediately thereafter, Applicant's father, working with a bonding company, arranged to have surety bonds posted in the amounts set

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[6] *See* Applicant's Exhibit 2 and Applicant's Exhibit 5.

[7] *See* Applicant's Exhibit 5.

[8] *Id.*; *see also* Applicant's Exhibit 3 (Public Safety Assessment), RR Vol. 4 at 12 (admitted at RR Vol. 2 at 9).

[9] *See* Applicant's Exhibit 2 and Applicant's Exhibit 5.

[10] *See* Applicant's Exhibit 2 and Applicant's Exhibit 5.

for both cases.[11] Applicant was subsequently released from the Harris County Jail in the early morning hours of November 15, 2019.[12]

As directed on his bond paperwork, Applicant appeared that same morning at 9:30 a.m. in the 338th Judicial District Court of Harris County, Texas.[13] Applicant's intention was to ask the court to permit him time to retain undersigned counsel to represent him in the two cases.[14] Applicant, however, was surprised when the trial court judge called him up to the bench.[15]

The following facts of what took place are not in dispute. Upon Applicant approaching the bench, the trial court asked the attorney for the State to recite the probable cause for the arrest.[16] No record was made of this proceeding.[17] Although no order is reflected in the Clerk's

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[11] *See* Applicant's Exhibit 6 (Affidavit of Applicant's father), RR Vol. 4 at 18–20 (admitted at RR Vol. 2 at 10).

[12] *See* Applicant's Exhibit 7 (Bail bonds for both cases), RR Vol. 4 at 21–26 (admitted at RR Vol. 2 at 14).

[13] *See id.*; Applicant's Exhibit 8 (Unsworn declaration of Applicant), RR Vol. 4 at 27–28 (admitted at RR Vol. 2 at 15).

[14] *Id.*

[15] *Id.*

[16] *See* RR Vol. 1 at 11; RR Vol. 2 at 24.

[17] *See* RR Vol. 1 at 11.

file, the trial court *sua sponte* asked an attorney in the courtroom that handled appointed cases in her court to stand in next to Applicant.[18] This was done despite Applicant having previously indicated that he did not want counsel appointed to represent him in the district court and having every intention of retaining undersigned counsel to represent him instead.[19] There were no discussions between Applicant and this unknown attorney regarding him or his cases.[20] In addition to hearing probable cause, the trial court also considered and granted the State's motion for an order that Applicant not have any contact with the complaining witness.[21] Without any request or motion from the State,[22] the

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[18] *See* RR Vol. 1 at 4–5; RR Vol. 2 at 24; *see generally* Supp CR (showing no order or docket sheet entry reflecting the appointment of counsel). While the docket sheet in the Supplemental Clerk's Record reflects that Applicant appeared on November 15 with counsel "TABONE, SIERRA", as the record from the hearing on November 18, reflected, that was not the case. *Cf.* Supp. CR at 155 and RR Vol. 1 at 4–5. Ms. Tabone did not make her appearance in the case until November 18. *See* RR Vol. 1 at 4–5. The docket sheet does not reflect the appointment of an attorney on November 15. *See* Supp. CR at 155–56.

[19] *See* Applicant's Exhibit 8.

[20] *Id.*

[21] *See* RR Vol. 1 at 5; Supp. CR at 16 (no contact order). It should be noted that the magistrate had already entered and served a Magistrate's Order for Emergency Protection on Applicant, ordering that he not have any threatening or harassing communication with the alleged complainant. *See* Applicant's Exhibit 4, RR Vol. 4 at 13–17 (admitted at RR Vol. 2 at 9); Supp. CR at 5–10.

trial court then *sua sponte* revoked the bonds just posted by Applicant, ordered that he be remanded back into the custody of the Harris County Sheriff, and raised the bond amounts in both cases to $75,000.00 in each case.[23]

On the following Monday, November 18, 2019, undersigned counsel for Applicant (after making her initial appearance in the case) appeared before the trial court and raised the objection that the court illegally revoked Applicant's bonds at the *sua sponte* hearing that took place on November 15 and that there was no cause to justify revoking the bonds.[24] Counsel for Applicant then requested the court to reinstate the bonds that Applicant had posted just hours before appearing in court.[25] The trial court stated the following:

> [A]s you stated that the magistrate heard the case before I did. Once a case comes into this court, the sitting judge has the opportunity to hear probable cause, which I did. And,

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[22] *See generally* Supp. CR (showing no motion to revoke filed by the State). There was a motion filed by the State before the magistrate Judge requesting a bond be set at $100,000.00 in each case. *See* Supp. CR at 10. As reflected on Exhibit 2 and in Exhibit 5, however, the magistrate considered that request and nevertheless set the bonds at $25,000.00 and $10,000.00 in the two cases.

[23] *See* RR Vol. 2 at 24; Supp. CR at 13.

[24] *See* RR Vol. 1 at 5, 6–7.

[25] *See* RR Vol. 1 at 13.

> again, as I stated to you before and on the record, there was an attorney that was appointed for the limited purposes of a bond who also argued on behalf of the client at that time, as well as the State. The Court heard PC and followed the case law. That is not just the only consideration. There are many factors that a court has to weigh in making a determination of a bond.
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> And let me make sure that I'm clear on the record also. The $15,000 that was essentially attached — that was ordered by the magistrate was on the assault impeding breathing case, and the burglary of habitation was $25,000. Motion denied.[26]

On November 21, 2019, Applicant filed a sworn, application for writ of habeas corpus seeking to vacate the illegal order revoking his bond in cause numbers 1653305 and 1653306.[27] The applications were assigned their own cause numbers: 1657519 and 1657521, respectively for each case.[28] Although counsel for Applicant made demand for an immediate hearing, the trial court did not hold a hearing on the applications until December 10, 2019.[29]

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[26] RR Vol. 1 at 10–11.

[27] CR at 4–57. There was a previous Application for Writ of Habeas Corpus Seeking Bond Reduction, filed by Applicant on November 18, 2019. CR at 58–63. The Application filed on November 21 superseded this previous application and this previous application was not raised nor discussed at the hearing on December 10, 2019.

[28] CR at 4–57.

[29] *See generally* RR Vol. 2.

At that hearing, Applicant presented the evidence set out above and also presented testimony from Applicant's father.[30] He attested that, while he had attempted to contact bonding companies to make the new, raised bonds set by the trial court, he nor anyone else associated with Applicant was able to come up with the money to post the bonds.[31] Applicant also admitted certified copies of the entire clerk's file in other cases pending before the trial court where the trial court had done nearly the identical thing in this case: *sua sponte* raising the bonds after hearing probable cause from the State in court a second time.[32]

After hearing arguments from both Applicant and the State, the trial court issued its ruling and made the following findings:

> The Court having heard the evidence and the arguments of the parties, the Court finds Code of Criminal Procedure, Article 17.09, Section 3 applicable in this matter.

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[30] *See* RR Vol. 2 at 7–17.

[31] RR Vol. 2 at 12–13.

[32] *See* Applicant's Exhibit 9, RR Vol. 3 at 29–326 (admitted RR Vol. 2 at 15–16). As pointed out on the record, these are the "entire clerk's files for other cases that are pending before" the trial court to show "that this is not an isolated incident" and that what the trial court did in these other cases is what the trial court "did in this particular case, which is to review the probable cause, find that the bond set by the magistrate was not -- was not appropriate, revoke and raise those bonds, and require the defendants to post other bonds." RR Vol. 2 at 15–16. The trial court took no issue with this representation and admitted the documents. *Id.*

Article 17.09, Section 3 provides, among other things, that whenever -- and I stress the word "wherever." (sic) "Whenever, during the course of the action, the judge in whose court such action is pending finds the bond is insufficient -- bonds are insufficient in amount, such judge may order the accused to be rearrested, and require the accused to give another bond."

The Court did just that on November 15, 2019, during a bail review hearing in which the Court appointed counsel to Mr. Joseph Gomez in the interest of justice.

The Court heard the probable cause in this manner and deemed the original bond was insufficient, and the Court determined the proper amount of bail to be set in this matter at $75,000 per case.

Case law clearly allows a court to impose a higher bond for reasons such as reevaluating the circumstances and the adequacy of a defendant's bond.

It is clearly within the Court's discretion to increase the bail set in accordance with the rules for fixing the amount of bond -- of bail.

The Applicant's notice (sic) is denied for Writ of Habeas Corpus.[33]

[33] RR Vol. 2 at 23–24.

SUMMARY OF THE ARGUMENT

The trial court's actions were illegal on two levels. First, the trial court erred in revoking Applicant's bond for no valid cause other than, upon hearing a recitation of the probable cause for the arrest from the attorney for the State, the trial court was unsatisfied with the bond set by the magistrate. Second, the manner in which the trial court revoked Applicant's bond violated due process protections and the Rules of Evidence. The trial court held the hearing at Applicant's initial appearance without any notice to him that it intended to consider revoking and raising his bonds. The trial court then denied Applicant his right to counsel of his own choosing, erroneously thinking, by *sua sponte* asking some unknown, unidentified attorney to stand in, that "the interests of justice" would be satisfied. Finally, the trial court considered an otherwise-inadmissible reading of the probable cause when the Rules of Evidence require their application at a hearing to revoke or raise bail. Accordingly, this Court should find that the trial court abused its discretion, reverse its judgment, grant habeas relief, and order that Applicant's bonds be reinstated.

ARGUMENT

POINT OF ERROR ONE

THE TRIAL COURT ERRED BY REVOKING AND RAISING APPLICANT'S BOND WITHOUT "GOOD OR SUFFICIENT CAUSE."

The United States Court of Appeals for the Fifth Circuit recently recognized some of the most fundamental provisions of Texas law when it comes to setting bail for individuals accused of criminal offenses.[34] The court noted that "Texas courts have repeatedly emphasized the importance of bail as a means of protecting an accused detainee's constitutional right 'in remaining free before trial,' which allows for the 'unhampered preparation of a defense, and ... prevent[s] the infliction of punishment prior to conviction.'"[35] Furthermore, the court recognized that the courts of our State "have sought to limit the imposition of 'preventive [pretrial] detention' as 'abhorrent to the American system of justice'" and that "'the power to ... require bail,' not simply the denial of bail, can be an 'instrument of [such] oppression.'"[36]

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[34] *O'Donnell v. Harris County*, 892 F.3d 147, 158 (5th Cir. 2018).

[35] *Id.* (quoting *Ex parte Anderer*, 61 S.W.3d 398, 404–05 (Tex. Crim. App. 2001)(en banc)).

[36] *Id.* (quoting *Ex parte Davis*, 574 S.W.2d 166, 169 (Tex. Crim. App. 1978) and *Taylor v. State*, 667 S.W.2d 149, 151 (Tex. Crim. App. 1984)(en banc)).

Indeed, "[t]he primary purpose of pretrial bail is to secure the defendant's attendance at trial, and the power to require bail should not be used as an instrument of oppression.[37]

Article 17.09, Section 2 of the Texas Code of Criminal Procedure is one of the mechanisms in place to serve this purpose and protect against bail being used as an instrument of oppression. It states, "When a defendant has once given bail for his appearance in answer to a criminal charge, he shall not be required to give another bond in the course of the same criminal action except as herein provided."[38] Section 3 sets out the exception, providing

> that whenever, during the course of the action, the judge or magistrate in whose court such action is pending finds that the bond is defective, excessive or insufficient in amount, or that the sureties, if any, are not acceptable, or for any other good and sufficient cause, such judge or magistrate may, either in term-time or in vacation, order the accused to be rearrested, and require the accused to give another bond in such amount as the judge or magistrate may deem proper.[39]

Although this Court's sister court has recognized that "[n]o precise standard exists for determining what constitutes 'good and sufficient

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[37] *Ex parte Allen–Pieroni*, 524 S.W.3d 252, 254 (Tex. App.—Waco 2016, no pet.).

[38] TEX. CODE CRIM. PROC. art. 17.09, Sec. 2 (West Supp. 2019).

[39] TEX. CODE CRIM. PROC. art. 17.09, Sec. 3 (West Supp. 2019).

cause' under Article 17.09" and that "each case must be reviewed on a fact-by-fact basis,"[40] no appellate decision or other law has ever authorized the trial court to act in the manner and fashion that it did so here in revoking Applicant's bonds. There was no "good or sufficient cause" justifying its action. Applicant appeared in court exactly as was his obligation. Once there, the trial court simply heard the probable cause from the attorney for the State and, unsatisfied with the bond amounts set by the magistrate, revoked and raised those bonds.

In *Meador v. State*, for instance, this Court's sister court held that the "good and sufficient cause" requirement in Article 17.09 had not been met and that the trial court abused its discretion in revoking the appellant's original bond of $100,000 where the appellant was three minutes late to a court appearance and failed to appear with an attorney as previously ordered by the trial court.[41]

In another case, *Ex parte King*, the Court of Criminal Appeals held that a trial court abused its discretion in revoking a defendant's

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[40] *Miller v. State*, 855 S.W.2d 92, 93–94 (Tex. App. [14th Dist.] 1993, pet. ref'd).

[41] *Meador v. State*, 780 S.W.2d 836, 837 (Tex. App.—Houston [14th Dist.] 1989, no pet.).

bond where there was no evidence in the "record to explain the action of the trial judge revoking the posted bail bond and increasing bail, other than his apparent displeasure with counsel's filing the motion for continuance and he having to grant same under law."[42]

This is not like those cases where courts have held that "good and sufficient cause" exists to revoke and raise a defendants bond.[43] For example, in *Liles v. State*, the court held that the trial court did not abuse its discretion where it revoked the appellant's personal recognizance bond and raised the bond to $20,000.00.[44] The court relied upon the fact that the appellant there was re-indicted and the new indictments alleged "aggravating circumstances that seriously increase[d] the gravity of the crime charged."[45] As the record reflected here, on the other hand, the indictment against Applicant charged him with the same offense he

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[42] *Ex parte King*, 613 S.W.2d 503, 504–05 (Tex. Crim. App. 1981).

[43] *Liles v. State*, 550 S.W.3d 668, 671 (Tex. App.—Tyler 2017, no pet.) (discussed *infra*); *Ex parte Bernal*, No. 10-16-00403-CR, 2017 WL 2192867, at *2 (Tex. App.—Waco 2017, no pet.)(mem. op.)(not designated for publication)(upholding revocation of bond where defendant tested positive for marijuana); *Ex parte Marcantoni*, No. 14-03-00079-CR, 2003 WL 1887883, at *2 (Tex. App.—Houston [14th Dist.] 2003, no pet.)(mem. op.)(not designated for publication)(same).

[44] *Liles*, 550 S.W.3d at 671.

[45] *Id.*

was initially charged with by complaint.[46] Furthermore, at the hearing on his application for writ of habeas corpus, the State presented no new information beyond what was initially presented at the hearing before the magistrate judge.[47]

This Court also addressed this issue in *Queen v. State*.[48] In that case, this Court held that the trial court abused its discretion in revoking the appellant's bond even though he was arrested for a misdemeanor offense of theft while on bail for the felony offense of burglary of a habitation.[49] This Court took note of the fact that the appellant in that case "appeared for trial in connection with the misdemeanor shoplifting charge after being admitted to bail in that cause tend[ing] to show that appellant is more, not less, likely to appear for trial in this cause."[50] In the instant case, Applicant did the same thing: appear in court as he was obligated to do.

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[46] *Cf.* Applicant's Exhibit 1, RR Vol. 4 at 2–5 (complaints) with State's Exhibits 1 & 2, RR Vol. 3 at 2–5 (indictments).

[47] *See* RR Vol. 1 at 17.

[48] *Queen v. State*, 842 S.W.2d 708, 712 (Tex. App.—Houston [1st Dist.] 1992, no pet.)

[49] *Id.*

[50] *Id.*

As proof that there was nothing unique about Applicant's case — and further proof that the trial court engages in this similar *sua sponte* action of revoking and raising bonds upon reviewing the probable cause — Applicant admitted certified copies of the entire clerk's files for other cases pending before this trial court where the same has occurred.[51] The trial court took no issue with this. As the trial court's ruling reflected, the court believed (mistakenly) that "(c)ase law clearly allows a court to impose a higher bond for reasons such as reevaluating the circumstances and the adequacy of a defendant's bond."[52]

Allowing the trial court to raise bonds in this manner on a "whim" creates a dangerous precedent. Any defendant in any court in any county in this district could appear in court one day for any non-trial setting as required and, if the trial court judge asks for the probable cause and is not satisfied with the bond amount, under this precedent, the trial court could immediately revoke that bond and raise it.

Because the trial court abused its discretion in revoking Applicant's bond, this Court should reverse the trial court's judgment, grant

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[51] *See* Applicant's Exhibit 9, RR Vol. 4 at 29–326.

[52] RR Vol. 2 at 24.

Applicant habeas relief, and order that the original bonds posted be re-instated.

POINT OF ERROR TWO

THE TRIAL COURT ERRED IN THE MANNER BY WHICH IT REVOKED AND RAISED APPLICANT'S BOND BY PROVIDING NO NOTICE OF ITS INTENDED ACTION, DENYING APPLICANT HIS RIGHT TO COUNSEL OF HIS OWN CHOOSING, AND FAILING TO ADHERE TO THE RULES OF EVIDENCE

In addition to the trial court erring by revoking and raising Applicant's bond without good and sufficient cause as discussed in Point of Error One, *supra*, the trial court also erred in the manner by which it acted. First, the trial court provided no notice whatsoever of its intended action, violating one of the most fundamental principles of due process: notice. Second, the trial court denied Applicant his right to counsel of his own choosing to represent him at the court's *sua sponte* hearing. Finally, the trial court erred by considering evidence presented in violation of the Rules of Evidence.

A. Applicant was Provided No Notice of the Trial Court's Hearing to Revoke and Raise His Bond

The United States Supreme Court has noted that the "fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to

apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[53] Stated more succinctly, "Failure to give notice violates 'the most rudimentary demands of due process of law.'"[54] And "[d]ue process is not satisfied where parties are not given prior notice of what is really at stake in a proceeding."[55]

This Court's sister court has held that "due process requires the trial court to provide the defendant with reasonable notice that it intends to deny bail pending appeal and to allow the defendant a meaningful opportunity to be heard."[56] Although this was not a case of bail pending appeal, Applicant would submit that the due process protections nevertheless apply — even more so because, whereas in the case of a person on bail pending appeal where the State has overcome the pre-

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[53] *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950).

[54] *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84, 108 S. Ct. 896, 99 L. Ed. 2d 75 (1988) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 550, 85 S. Ct. 1187, 1190, 14 L. Ed. 2d 62 (1965)).

[55] *Smith v. State*, 993 S.W.2d 408, 416 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd)(Edelmen, J., dissenting)(citing *Lankford v. Idaho*, 500 U.S. 110, 119–28, 111 S. Ct. 1723, 114 L. Ed. 2d 173 (1991)).

[56] *Robinson v. State*, 700 S.W.2d 710, 713 (Tex. App.—Houston [14th Dist.] 1985, no pet.); *see also Smith*, 993 S.W.2d at 412 ("[W]e still agree with the *Robinson* court that due process protections of notice and a reasonable opportunity to be heard attach to an appeal bond revocation based on an appellant's liberty interest.").

sumption of innocence and proven guilt beyond a reasonable doubt, in the instant case, Applicant is still shrouded by the presumption of innocence.[57]

In this case, Applicant had not been released from jail for more than twelve hours before he appeared in court and was confronted with the trial court's action in revoking the bonds. He, nor anyone else had any prior knowledge of what the trial court intended to do when there should have been, as a matter of due process, reasonable notice.

B. Applicant was Denied his Constitutional Right to Counsel of His Own Choosing

At the bail hearing before the magistrate judge, Applicant was offered, and agreed to accept the limited representation of counsel from an assistant public defender.[58] That assistant public defender had an opportunity to confer with Applicant, review the Public Safety Assessment and other evidence, and, most importantly, advocate for Applicant in seeking a lower bond using the factors set forth in Article 17.15, Tex-

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[57] *See Ex parte Dupuy*, 498 S.W.3d 220, 230 (Tex. App.—Houston [14th Dist.] 2016, no pet.)("A defendant is entitled to the presumption of innocence on all charges, and the trial court, when setting bail, must strike a balance between that presumption and the State's interest in assuring that a defendant will appear for trial.").

[58] *See* Applicant's Exhibit 2 and Applicant's Exhibit 5. This representation is being provided as part of a pilot program offered in Harris County.

as Code of Criminal Procedure and the relevant case law.[59] Accordingly, Applicant was afforded his fundamental right to due process by having the assistance of counsel *of his choosing* at a critical stage in the proceedings.[60]

Such was not the case when Applicant appeared before the trial court shortly after his release from custody. With no notice and no opportunity to make any effective choice, the trial court *sua sponte* appointed some unknown attorney "for the limited purposes of bond, as well as standing in for a no-contact order."[61] This occurred despite Applicant previously indicating that he did not want counsel appointed to represent him in the district court.[62] Because there is no record of the proceeding, there is no way of knowing exactly what occurred. But, by all accounts, this unknown lawyer was nothing more than a "potted

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[59] *See id.*

[60] *See Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963); *Webb v. State*, 533 S.W.2d 780 (Tex. Crim. App. 1976).

[61] RR Vol. 1 at 4. It is worth noting that, despite this error being brought to the trial court's attention on several occasions (orally and in writing), the trial court has yet to name who this "mystery lawyer" was that the trial court appointed to represent Applicant. The clerk's record contains no order from the court appointing counsel. *See generally* Supp. CR. Applicant himself attested that he had no recollection of who this attorney was. *See* Applicant's Exhibit 8.

[62] *See id.*; Applicant's Exhibit 2.

plant."[63] More importantly, the trial court denied Applicant his constitutional right to counsel of his own choosing.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."[64] The United States Supreme Court has recognized that "an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him."[65] So well-established is this rule that nearly 100 years ago, the Court stated, "It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."[66]

As Applicant attested — and was uncontested at the hearing on his application for writ of habeas corpus — it was his intention to ap-

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[63] *See* Applicant's Exhibit 8.

[64] U.S. CONST. amend VI.

[65] *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144, 126 S. Ct. 2557, 2561, 165 L. Ed. 2d 409 (2006) (citing *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L.Ed.2d 140 (1988)).

[66] *Powell v. Alabama*, 287 U.S. 45, 53, 53 S. Ct. 55, 77 L. Ed. 158 (1932).

pear in court and ask for time to retained undersigned counsel.[67] If the trial court had an issue with the bond, it should have, at a minimum, given Applicant the opportunity to retain counsel and appear with that counsel at a reasonably-noticed hearing. None of those things took place.

C. The Rules of Evidence Apply at a Hearing to Revoke or Raise Bail; The Trial Court Never Acknowledged that they were Applied Here

Although the Rules of Evidence do not apply in a number of enumerated circumstances, including in habeas proceedings and proceedings to *reduce* bond, Rule 101(e)(3)(C) specifically excepts this exception in a "bail proceeding" to revoke and *increase* bail.[68] As such, it was incumbent upon the trial court to consider and apply the rules.

By all accounts, that is not what happened. Again, as the trial court stated on the record, the court simply heard "the probable cause"

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[67] *See* Applicant's Exhibit 8. It is worth recalling that Applicant had just been released from custody hours before going directly to the trial court. He was literally going to leave from court and go straight to undersigned counsel's office to sign a contract of employment.

[68] *See* TEX. R. EVID. 101(e)(3)(C); *Ex parte Graves*, 853 S.W.2d 701, 703–04 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd).

from the prosecutor.[69] This was inadmissible hearsay.[70] Although there was no record to show whether the "potted plant" objected to this, when confronted by counsel for Applicant the following business day that this amounted to inadmissible hearsay evidence, the trial court nor the State offered nothing to contradict this.[71] The same occurred at the hearing on his application for writ of habeas corpus.[72]

If the trial court intended to revoke and raise Applicant's bond, it needed to provide him with adequate notice of that, provide him an opportunity to have counsel of his own choosing represent him at that hearing, ensure that the Rules of Evidence were followed at the hearing, and most importantly, only revoke and raise the bond upon a showing of "good or sufficient cause." Because none of these things occurred in this case, the trial court abused its discretion and this Court should

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[69] RR Vol. 1 at 11; RR Vol. 2 at 24 ("The Court heard the probable cause in this manner and deemed the original bond was insufficient").

[70] *See Dawson v. State*, 477 S.W.2d 277, 279–80 (Tex. Crim. App. 1972); *Hill v. State*, 832 S.W.2d 724, 726 (Tex. App.—Houston [1st Dist.] 1992, no pet.).

[71] RR Vol. 1 at 5–6.

[72] RR Vol. 2 at 24.

reverse the trial court's judgment, grant Applicant habeas relief, and order that the original bonds posted be reinstated.

PRAYER

WHEREFORE PREMISES CONSIDERED, Applicant respectfully moves this Court to reverse the judgement of the trial court, grant Applicant habeas relief, and order that the original bonds posted be reinstated.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been served on to the attorney for the State, Dan McCrory, Harris County District Attorney's Office, pursuant to Texas Rule of Appellate Procedure 9.5 (b)(1), through Appellant's counsel's electronic filing manager on January 8, 2020.

/s/ T. Brent Mayr
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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rules of Appellate Procedure 9.4(i)(2)(B) and 9.4(i)(3), undersigned counsel hereby certifies that this computer-generated document contains 5,141 words as calculated by the word count feature contained within the program used to prepare said document, namely, Microsoft Word for Office 365.

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